Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARCO DAMICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the wake of *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997), the majority of federal circuits hold that a certificate of appealability is unnecessary where a petitioner seeks appellate review from the denial of a §§ 2254 or 2255 petition/motion, filed before the effective date of the Antiterrorism and Effective Death Penalty Act. The Eighth Circuit in *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997), and the Seventh Circuit in this case, hold otherwise. This circuit split raises the following questions:

1. Whether the court of appeals erred in requiring the issuance of a certificate of appealability, as a precondition for appellate review, where none was required because petitioner's refiled 28 U.S.C. § 2255 motion was a continuation of his pre-AEDPA filing, which had been dismissed because of his [then pending] direct appeal?

2. Whether in light of *Bousley v. United States*, 118 S.Ct. 1604 (1998), can a pre-*Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501 (1995), guilty plea be considered voluntary and intelligent where the district court failed to develop any factual basis for either use or carry, beyond reference to the § 924(c)(1) count and defendant's plea agreement?

PARTIES TO THE PROCEEDINGS

Marco Damico, petitioner, was the only movant in *Damico v. United States*, 97 C 3513 (motion for relief pursuant to 28 U.S.C. § 2255). His appeal to the United States Court of Appeals for the Seventh Circuit was dismissed on August 6, 1998 under Seventh Circuit Docket No. 98-1914.

The United States is the respondent in these proceedings.

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PETITION FOR WRIT OF CERTIORARI

Marco Damico prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The order of the court of appeals denying petitioner's certificate of appealability is unreported. Pet. App. 1a-2a. The opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 99 F.3d 1431. Pet. App., *infra*, 3a-17a.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit denying petitioner's certificate of appealability was entered on August 6, 1998. Pet. App. 1a-2a. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 2255. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See *Hohn v. United States*, 118 S.Ct. 1969, 1978 (1998) (Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1) to review denials of applications for certificates of appealability).

STATUTORY PROVISIONS INVOKED

Section 2253(c) of Title 28 of the United States Code provides, in pertinent part: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under Section 2255. * * * A certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides in pertinent part: "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *."

Section 924(c)(1) of Title 18 of the United States Code provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, shall, in addition to the punishment Provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

Rule 11(c)(1), of the Federal Rules of Criminal Procedure in pertinent part states:

> **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered . . .

Rule 11(f), of the Federal Rules of Criminal Procedure states:

> **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

18 U.S.C. § 1951 (West, 1990), in pertinent part states:

§ 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT

Marco Damico was convicted and is incarcerated for conduct which, in part, may not rise to the level of a crime under this Court's holding in *Bailey v. United States,* 516 U.S. 137, 116 S.Ct. 501 (1995). In March 1996, during the pendency of his direct appeal, he filed a motion seeking collateral relief pursuant to 28 U.S.C. § 2255. As more fully explained, *infra*, the district court dismissed Damico's § 2255, without prejudice, adopting the government's position that seventh circuit precedent foreclosed contemporaneous collateral and [direct] appellate proceedings. Following the affirmation of Damico's direct appeal, and the denial of certiorari, Damico refiled his § 2255 petition. The district court, after rejecting the government's second or successive AEDPA position, denied Damico's motion on its merits. Damico filed a timely notice of appeal and docketing statement asserting, *inter alia,* that a certificate of appealability (hereafter CAPP or COA) was unnecessary, but if necessary, Damico made a substantial showing of the denial of a

constitutional right. On August 6, 1998, the court of appeals declined to issue a CAPP. Pet. App. 1a-2a.

1. On November 17, 1994, in Chicago, the Special March 1994 grand jury returned a multi-count indictment charging Damico and others with RICO conspiracy, gambling, IRS and extortion violations. R. 7. The *sine qua non* of the indictment was that Damico and others ran a bookmaking operation in the Chicago area from the late 1970s to December 1992. Pertinent to this petition, count six of the indictment charged Damico with aiding and abetting the attempted robbery of a card game on November 29, 1989 (. . . Abbinanti and Damico did ". . . knowingly use and carry a firearm with a silencer during and in relation to a crime of violence . . ." in violation of 18 U.S.C. §§ 2, 924(c)(1) and 1951(a)). Pretrial discovery revealed that Damico had frequent contact with an erstwhile Chicago lawyer, Robert Cooley, who became a government informant in 1986. In October 1989, the informant advised Damico of a private card game involving lawyers, doctors and possibly drug dealers. The informant encouraged Damico to formulate a plan to rob the private card game. Eventually, Damico, with the informant and co-schemer, Abbinanti, charted a plan to rob the Lake Geneva, Wisconsin [private] card game on November 29, 1989. Damico never left Chicago, nor otherwise participated in the alleged attempt robbery. There was no card game: rather, at the address provided by the informant, a group of agents sat waiting for the attempted robbery to occur. Neither Abbinanti nor any robber ever appeared; no weapon was brandished or exposed (e.g., used or carried). The "sting" card game [was] abandoned and the agents scattered.

2. Damico has been immured since the return of the indictment on November 17, 1994. Represented by counsel, a plea agreement was struck whereby the government substituted an information charging the same § 924(c)(1) violation, *albeit,* absent the silencer. On May 1, 1995, petitioner, appeared before the district court and pursuant to a written plea agreement, pled guilty to the indictment, including the substituted single count information. R. 197, Pet. App. 18a. The pre-*Bailey*, Rule 11 dialogue between the district court, Damico and counsel, relevant to § 924(c)(1) included only the following:

> THE COURT: You are charged in the information with the commission of a felony, that is, with knowingly using and carrying a firearm during and in relation to a crime of violence on or about November 30th of 1989 in the Northern District of Illinois, Eastern Division, in violation of Title 18, United States Code, section 924(c). Do you understand that charge, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Mr. Von Hoene, let me just ask you this. Without going into any of the facts of that particular count, in summary form, what explanation have you given to Mr. Damico as to the nature of the charge in this one-count information?
>
> MR. VON HOENE [Defense Attorney]: Your Honor, I have communicated to him with regard to the statute at issue and the nature of the issue. We have discussed the facts that underline the one-count information which are also facts common to a portion of Count I of the indictment itself.
>
> THE COURT: All right.

MR. VON HOENE: We have discussed his potential exposure under the statute and the factual basis upon which the plea of guilty is being entered. (ROP 5/1/95 at Tr. 9-10)

* * * *

THE COURT: All right. Now, Mr. Von Hoene, I'll first ask you, once again, without reference to any of the facts in the case, would you summarize for the Court exactly what you told your client he was charged with doing in this indictment?

MR. VON HOENE: Your Honor, we carefully reviewed the particular terms of the indictment with Mr. Damico as well as the statutes underlying the charges. We have also reviewed the evidence to date that has been provided, the discovery provided by the Government, and discussed with Mr. Damico its applicability to the particular charges. I believe he fully understands the nature of the charges against him both statutorily and factually.

THE COURT: All right. Mr. Damico, is that correct? Do you understand all of the charges that you are charged with?

THE DEFENDANT: Yes, Judge.

THE COURT: All right. And you have discussed these charges with Mr. Von Hoene, those charges that you intend to offer a plea of guilty to, including all possible defenses?

THE DEFENDANT: Yes. (ROP 5/1/95 at Tr. 14-15)

* * * *

THE COURT: All right. Mr. Damico, I indicated early on what you were charged with. At this

time, I'm going to ask you with respect to each of the counts, I'm going to ask you to tell me in your own words what it is that you did.

With respect to Count I, where you are charged with knowingly and intentionally conspiring to conduct the affairs of an enterprise through a pattern of racketeering and the collection of unlawful debt, would you tell me with respect to that count what it is that you did?

(Discussion off the record.)

THE DEFENDANT: The things that are summarized in the indictment and in the agreement.

THE COURT: Okay. You've read—you've carefully read the plea agreement, and you know exactly what is contained in it, and you are in agreement with the facts as they are set forth in that agreement.

THE DEFENDANT: Yes, ma'am.

THE COURT: And is that correct, sir, with respect to Count II as well?

THE DEFENDANT: Yes, ma'am.

THE COURT: And is that correct with respect to Count III?

THE DEFENDANT: Yes.

THE COURT: And is that correct with respect to Count IV?

THE DEFENDANT: Yes.

THE COURT: And also Count V?

THE DEFENDANT: Yes.

THE COURT: And Counts VII and VII?

THE DEFENDANT: Yes, ma'am.

THE COURT: And also with respect to the one-count firearms charge in the information?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. King, would you please summarize, if you will, what your evidence would be if you were to bring this matter to trial?

MR. KING [AUSA]: Your Honor, if the matter were to proceed to trial, the Government would call witnesses in the form of agents from the FBI, the IRS, and the Chicago Police Department, and call experts from the Internal Revenue Service, and present physical evidence, including the tape recorded conversations and electronically monitored conversations involving the defendant, and they would set forth the facts which we have set forth in specificity in paragraph 5 from pages 3 to 11 with respect to each of the elements of this offense, Your Honor.

THE COURT: Okay. So all of the facts are set forth in paragraph 5?

MR. KING: Yes, Your Honor. (ROP 5/1/95 at Tr. 29-31)

On October 3, 1995, Damico was sentenced to seven years and three months on the gambling-RICO and IRS counts, with a consecutive five year sentence on the § 924(c) count.

3. On March 12, 1996, while Damico's direct appeal was pending, he filed a motion pursuant to 28 U.S.C. § 2255 challenging his guilty plea on the § 924(c)(1) count using *Bailey v. United States* as the foundation for his § 2255 challenge. On May 16, 1996, the district court declined to consider the merits of Damico's argument because of the pendency of his direct appeal. Pet.

App. 19a-20a.[1] The Seventh Circuit Court of Appeals, *post*-oral argument, granted Damico leave to supplement his pending appeal with the inclusion of an abbreviated *Bailey v. United States*' argument. The court of appeals rejected Damico's *Bailey* argument, 99 F.3d at 1433-35, *cert. denied*, *Damico v. United States*, 117 S.Ct. 1086 (1997).

4. On May 13, 1997, Damico re-submitted his § 2255, asserting, *inter alia*, that *Bailey v. United States*, compelled a searching Rule 11 inquiry and the district court's failure to do so compelled vacation of the § 924(c) count. The government sought § 2255 dismissal claiming the 1997 filing was a second or successive. On January 28, 1998, the district court held that the 1997 filing was neither second nor successive, but rejected relief holding, *inter alia*, that the district court was precluded from considering the guilty plea issue by virtue of the Seventh Circuit affirmation. Pet. App. 23a-30a. On March 24, 1998, the district court declined to reconsider its ruling and refused to issue a CAPP pursuant to 28 U.S.C. § 2253(c)(2). Pet. App. 34a-35a.

On March 26, 1998 Damico filed his notice of appeal and docketing statement pursuant to FRAP Rule 22(b) and Seventh Circuit Rule 3(c).[2] On August 6, 1998, the court of appeals dismissed Damico's appeal. Pet. App. 1a-2a.

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[1] On May 22, 1996, the district court noted that the dismissal was without prejudice. Pet. App. 21a-22a.

[2] Seventh Circuit Rule 3(c), directs counsel to file a docketing statement containing arguments in support of a CAPP. Damico's March 26, 1998 docketing statement noted that no CAPP was needed, but if required, Damico satisfied CAPP mandates.

REASONS FOR GRANTING THE PETITION

1. The question of whether a CAPP is necessary where the § 2255 petition was filed prior to the AEDPA is controlled by *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997). In *Lindh*, the Court ruled that the AEDPA is not retroactively applied to non-capital habeas petitions pending as of April 24, 1996, 117 S.Ct. at 2068. Under *Lindh*, if the AEDPA has no application then the court of appeals clearly erred in dismissing petitioner's § 2255 based on his failure to satisfy CAPP mandates.

Damico filed his first § 2255 petition on March 12, 1996, prior to AEDPA enactment. The district court dismissed, without prejudice, on May 16 and 22, 1996. The predicate for dismissal was the pendency of Damico's direct appeal, e.g., failure to exhaust his [direct appeal] remedies. Pet. App. 19a-20a. On May 13, 1997 (97 CIV 3513), Damico refiled his § 2255 motion, following direct appeal affirmation and *cert.* denial, 99 F.3d 1431 (7th Cir. 1996); *cert. denied*, 117 S.Ct. 1086 (1997).

A. *Refiling following dismissal for failure to exhaust remedies is a continuation of the earlier petition and not a second or successive filing.*

The federal courts of appeals have consistently held that refiling after an antecedent dismissal for failure to exhaust remedies is a continuation of the earlier filing and does not implicate the AEDPA, i.e., *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) ("We agree and conclude that *Gasery's* refiled petition is merely a *continuation of his first collateral attack*, not a "second or successive" petition within the meaning of § 2244(b)." * * *

"The sequence of filing, dismissal, exhaustion in state court, and refiling . . . might generate multiple docket numbers, *but it would not be right to characterize it as successive collateral attack.*") (ital. emph. added); *Dickinson v. Maine*, 101 F.3d 791, 791 (1st Cir. 1996) (same); *Cumarano v. Irvin*, 98 F.3d 44, 45-46 (2nd Cir. 1996) (same); *Christy v. Horn*, 115 F.3d 201, 208 (3rd Cir. 1997) ("We hold that when a prior petition has been dismissed without prejudice for failure to exhaust state remedies, no such authorization is necessary *and the petitioner may file his petition in the district court as if it were the first such filing.*") (ital. emph. added); *Bennett v. United States*, 119 F.3d 470, 471 (7th Cir. 1997) (same); *Carlson v. Pitcher*, 137 F.3d 416, 419 (6th Cir. 1998) ("Not surprisingly, then, in light of this history, every court addressing the issue since AEDPA took effect has held that "a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1).") (int. supp. cits. omitted). The Court's decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621 (May 18, 1998), lays to rest any putative ambiguity, *viz.*, the petitioner's entitlement to plenary adjudication.[3]

Thus, Damico's 1997 filing was a continuation of his pre-AEDPA 1996 filing. That said, the court of appeals clearly erred in holding that a CAPP was essential for

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[3] In *Stewart*, the Court affirmed the Ninth Circuit's position, holding that the resubmission of a habeas claim dismissed as premature, did not qualify as "second or successive" under the AEDPA (Rehnquist, C.J.).

appellate review of the merits of Damico's § 2255 petition.[4]

B. *Since the AEDPA had no application, the majority of circuits hold that Damico is entitled to plenary appellate merit review absent CAPP constraints.*

As illustrated, *ante*, the Court's decision in *Lindh v. Murphy* clarified the applicability of the AEDPA for appeals from an order denying a motion under § 2255 filed before April 24, 1996. The majority of federal circuits, *post-Lindh*, have held that the CAPP provisions of § 2253 do not apply to appeals from the denial of § 2255 motions which were filed before April 24, 1996. In *United States v. Skandier*, 125 F.3d 178 (3rd Cir. 1997), the court recalled its mandate, noting that *Skandier* had filed his § 2255 petition prior to April 24, 1996 and therefore the district court's February 1997 § 2255 dismissal did not mandate CAPP issuance for plenary appellate review. The *Skandier* panel noted that *post-Lindh*, every federal circuit, save for the Eighth Circuit, held that a CAPP was not required for plenary appellate

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[4] The district court's declination to issue a CAPP is of no moment because none was required. Assuming, *arguendo*, that Damico sought same, his request cannot be used to avoid confronting certiorari issues, i.e., *United States v. Wells*, 117 S.Ct. 921, 925-26 (1997) ("But however valuable these [law of the case] doctrines may be in controlling the party who wishes to change its position on the way from the district court to the court of appeals, they cannot dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it was "pressed [in] or passed on" by the Court of Appeals, *United States v. Williams*, 504 U.S. 36, 42, 112 S.Ct. 1735, 1739, 118 L.Ed.2d 352 (1992) (internal quotation marks and emphasis omitted).").

review from the district court's denial of § 2255 motions filed prior to April 24, 1996. The panel cited, with approval, *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997); *United States v. Carter*, 117 F.3d 262, 263-65 and n. 1 (5th Cir. 1997); *Arredondo v. United States*, 120 F.3d 639, 639-40 (6th Cir. 1997); *Martin v. Bissonette*, 118 F.3d 871, 874-75 (1st Cir. 1997); each standing for the proposition that there is no CAPP requirement for plenary appellate review from the denial of an antecedent § 2255 motion filed prior to April 24, 1996.[5] After embracing the cited authorities with approval, the *Skandier* panel explained:

> *Rather, we believe that the better view for present purposes is that there is but one case, which commences with the filing of the petition or motion and continues through the appellate process.* Thus, so long as the § 2255 motion was filed before April 24, 1996, there was a case pending on that date even if the notice of appeal was filed after that date.

125 F.3d at 182, emph. added.

The *Skandier* panel noted that the Eighth Circuit in *Tiedeman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997), has taken a contrary position, *vis-a-vis*, CAPP requirements where appellate review was invoked after the effective date of the AEDPA. The Second and Tenth Circuit recently joined the majority of federal circuits in rejecting the Eighth Circuit's position, *Berrios v. United States*, 126 F.3d 430, 431, n. 2 (2nd Cir. 1997) (The

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[5] The *Skandier* panel also cited *post-Lindh* unpublished opinions from the Ninth and Tenth Circuits, holding that there was no CAPP requirement where the §§ 2254/2255 filings predated April 24, 1996, 125 F.3d at 181.

Third Circuit recently addressed the same situation in *Skandier* and concluded that, under *Lindh*, the COA provisions in § 2253(c) do not apply "to an appeal taken after the effective date of the AEDPA from an order denying the motion under 28 U.S.C. § 2255 that was filed before that date."); *United States v. Kunzman*, 125 F.3d 1363, 1365, n. 2 (10th Cir. 1997) (rejecting Eighth Circuit approach and explaining ". . . Upon consideration, we join the majority of circuits and hold that §§ 2254 and 2255 petitioners who filed their petitions in district court prior to *AEDPA's* effective date, regardless of whether they filed their notice of appeal before or after AEDPA, do not need a CAPP to proceed with their appeal.").

By virtue of the order below, the Seventh Circuit has now joined the Eighth Circuit in rejecting *Lindh*, contrary to the holdings of the First, Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits. Hence, there exists a circuit split regarding the correct interpretation of *Lindh v. Murphy* which only this Court can, and plainly should, resolve.[6]

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[6] Among the "considerations governing review" set forth in Supreme Court Rule 10(a) is the fact that a conflict exists between federal courts of appeals "on the same important matter." This Court has stated that resolution of such conflicts is "[a] principal purpose for which we use our certiorari jurisdiction." *Braxton v. United States,* 500 U.S. 344, 347 (1991). Granting review is especially appropriate where, as here, the conflict is so plain that it is expressly noted by the court below. *See, e.g., United States v. Lorenzetti*, 467 U.S. 167, 173 (1984). Supreme Court Rule 10(c) invites certiorari review where [a] United States Court of Appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

(continued...)

2. Whether in light of *Bousley v. United States*, 118 S.Ct. 1604 (1998), can a pre-*Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501 (1995), guilty plea be considered voluntary and intelligent where the district court failed to develop any factual basis for either use or carry, beyond reference to the § 924(c)(1) count and defendant's plea agreement?

On May 1, 1995, Damico executed a plea agreement and pled guilty to all counts of indictment 94 CR 723. The ten count indictment charged RICO, bookmaking, extortion and IRS violations. The substituted information charged a § 924(c)(1) violation. Pet. App. 18a. Beyond cavil, the plea agreement set forth facts and elements supportive of a § 924(c)(1) conviction. Nevertheless, the district court failed to engage either Damico or counsel in any Rule 11 colloquy, sufficient to develop any factual basis for "use and carry" or "crime of violence" (integral components of § 924(c)(1)). As set forth in petitioner's statement, *ante*, pp. 5-8, the district court never developed any "on the record" factual basis which could serve to support the § 924(c)(1) count of conviction. When the district court solicited the government to supply a factual basis for Damico's guilty plea, the government's response was:

> MR. KING [AUSA]: Your Honor, if the matter were to proceed to trial, the Government would call witnesses in the form of agents from the FBI, the IRS, and the Chicago Police Department, and call experts from the Internal Reve-

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[6] (...continued)

This petition satisfies the certiorari standards set forth in Rules 10(a) and 10(c).

> nue Service, and present physical evidence, including the tape recorded conversations and electronically monitored conversations involving the defendant, and they would set forth the facts which we have set forth in specificity in paragraph 5 from pages 3 to 11 with respect to each of the elements of this offense, Your Honor.
>
> THE COURT: Okay. So all of the facts are set forth in paragraph 5?
>
> MR. KING: Yes, Your Honor. (ROP 5/1/95 at Tr. 29-31)

In *Bousley v. United States* the Court held that *Bousley's* 1990 § 924(c)(1) guilty plea could be challenged under § 2255 in light of *Bailey v. United States*, 516 U.S. 137, 144 (1995). In essence, *Bousley* asserted that he was "misinformed" regarding the true nature of the charges against him, and thus his guilty plea was subject to attack because it was neither voluntary nor intelligent. The Court vacated the denial of *Bousley's* § 2255 [denial] affirmation holding that, on remand, *Bousley* should have the opportunity to demonstrate cause and [actual] prejudice for his default (unlike *Damico*, *Bousley* did not challenge his guilty plea on direct appeal). The Court also held that *Bousley* could advance challenges to his guilty plea if he was able to establish actual (factual) innocence, 118 S.Ct. at 1610-11 (Rehnquist, C.J.). Pertinent to Damico's petition is the following language from *Bousley*:

> And even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review.

118 S.Ct. at 1610.

The government will concede that Damico challenged his guilty plea on direct review, 99 F.3d at 1433-35. Hence, *Bousley's* procedural defaulting barriers are not present at bar. Damico's argument in support of vacation and remand finds support in a host of circuit cases. For example, in *United States v. James Gobert*, 139 F.3d 436, 439-40 (5th Cir. 1998), the court granted a COA while vacating Gobert's § 924(c)(1) guilty plea conviction finding that the record below failed to provide a sufficient factual basis to support the plea, 139 F.3d at 440-41 ("The factual basis filed by the government—and relied upon by the district court at the time he entered his guilty plea—contains nothing more than the bare assertion that "there was a .45 caliber pistol in David Gobert's vehicle." Even though James Gobert admitted during the plea colloquy that he violated § 924(c)(1), the factual basis is devoid of evidence that he or David Gobert used or carried the pistol in relation to the underlying drug offense." * * * "It therefore cannot be said that the factual basis in this case is sufficiently specific to have allowed the district court to determine whether David Gobert's conduct, theoretically attributed to James Gobert under the *Pinkerton* doctrine, fell within the ambit of § 924(c)(1)'s prohibitions.").

In *McCarthy v. United States*, 394 U.S. 459 (1969), the Court vacated a guilty plea affirmation from the Seventh Circuit, 387 F.2d 838 (CA 7, 1968). *McCarthy* was decided pursuant to the Court's supervisory powers over the lower federal courts in connection with Rule 11 adherence, 394 U.S. at 464. While reversing the guilty plea and sentence below, the Court noted that by ". . . personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntari-

ness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack," 394 U.S. at 466-67. In connection with *factual basis,* Chief Justice Warren explained ". . . Rule 11 also requires the judge to satisfy himself that there is a *factual basis* for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to *protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge,*" 394 U.S. at 467, nn. 18 and 19 omitted, italicized emphasis added.

Recent circuit cases following *McCarthy* include *United States v. Gigot,* 147 F.3d 1193, 1197-99 (10th Cir. 1998) (vacating guilty plea and sentence where district court failed to identify and explain elements of offense, notwithstanding written plea agreement); *United States v. Smith,* 60 F.3d 595 (9th Cir. 1995) (vacating guilty plea and conviction for non-compliance with Rule 11(c)(1) notwithstanding prosecution's factual basis allocution and written plea agreement; trial court's dialogue with the defendant and counsel that they had discussed the subject matter of the plea insufficient notwithstanding defense counsel's statement that defendant was making ". . . the plea with a full understanding of the nature of the charges and the consequence of the plea."; 60 F.3d at 597); *United States v. Gray,* 63 F.3d 57, 60-61 (1st Cir. 1995) (reliance on a written document is an insufficient proxy for personal examination by the court);

United States v. Bernal, 861 F.2d 434, 437 (5th Cir. 1988) (citing *McCarthy*, "Reliance on a signed statement, or on a statement which the defendant purports to read to himself in the presence of the district court, to establish that the accused understands the nature of the charges opens the door to later claims by the accused that he did not read or understand what he signed"); on denial of rehearing, 871 F.2d 490, 491 (5th Cir. 1989) (such an interpretation of Rule 11 would allow the district judge to sit in his chambers and accept a guilty plea so long as the accused signed papers reflecting his voluntary, knowing agreement to enter the plea); *United States v. Del Prete*, 567 F.2d 928, 930 (9th Cir. 1978) ("[a] written document is emphatically not a substitute for the clear dictate of the rule, which requires that the trial judge address the defendant in open court"); *United States v. Lowery*, 60 F.3d 1199, 1205 (6th Cir. 1995) ("It is not difficult to understand that Pelfrey, a lay person, might not understand why he would be guilty of aiding and abetting the crime of "using and carrying" a firearm on these facts. Pelfrey did not possess a gun at all, and he did not help Lowery obtain or prepare the sawed-off shotgun.").

The convoluted § 924(c)(1) facts reaching back to November 29, 1989 include Damico never leaving Chicago, while his alleged co-schemer, Abbinanti, travelled from Chicago to Lake Geneva, Wisconsin for the ostensible purpose of robbing the non-existent private card game. The "crime of violence" for § 924(c)(1) purposes was the attempt to rob the non-existent card came in violation of 18 U.S.C. § 1951. Pet. App. 18a.

In his § 2255, Damico advanced the position that an attempt to aid and abet the robbery of a private card game had no interstate commerce impact sufficient to

satisfy § 1951, see *United States v. Collins*, 40 F.3d 95, 99-101 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1986 (1995) (Section 924(c)(1) requires that the underlying offense be a federal crime and, as the robbery-of-Winn conviction for violation of section 1951(a) is now voided, the conviction for unlawful use of a firearm during that robbery also must be reversed.). In *Collins*, the reversing panel held that the theft of a company owner's personal vehicle, even where the stolen vehicle traveled in interstate commerce, could not support a section 1951(a) conviction, 40 F.3d at 99-100; *United States v. Quigley*, 53 F.3d 909, 910 (8th Cir. 1995) (holding no § 1951(a) jurisdiction where defendant committed local robbery of an individual); *United States v. Mattson*, 671 F.2d 1020, 1023-25 (7th Cir. 1982) (no § 1951(a) violations where private monies extorted from electrical contractor).

In the ensemble, decisions such as *Collins*, *Quigley* and *Mattson*, reveal that the interstate commerce nexus for § 1951 purposes relates to commercial or business enterprises, not individuals who are on private frolics. An attempt to aid and abet the robbery of a non-commercial and non-existing card game fails to support [even] a *de minimis* interstate commerce affect. Based on the complex factual underpinnings of the putative "crime of violence" (crucial for § 924(c)(1)), it is obvious that the district court's declination to engage the defendant and counsel in a probing Rule 11(f) factual basis inquiry, undermines the validity of petitioner's § 924(c)(1) guilty plea.[7]

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[7] The circuits are divided on whether, in the context of aiding and abetting a § 924(c)(1), the defendant must facilitate the carrying of the firearm rather than assist in the underlying crime. Cases holding that knowledge that a firearm would be

(continued...)

The circuits are divided on the question of whether reference to a written plea agreement, *aliunde*, can satisfy the Rule 11 factual basis mandate. The First Circuit in *United States v. Gray*, 63 F.3d 57, 60-61 (1st Cir. 1995), clearly holds that the district court may not rely on the written documents (plea agreement) as a proxy for personal examination by the court. The Ninth Circuit is in accord, *United States v. Smith*, 60 F.3d 595, 597 (9th Cir. 1995) (written plea agreement not a substitute for trial court's dialogue with defendant and counsel); *United States v. Del Prete*, 567 F.2d 928, 930 (9th Cir. 1978) (same); *United States v. Bernal*, 861 F.2d 434, 437 (5th Cir. 1988) (same). At bar the district court eschewed any factual basis development, opting instead for plenary reliance on Damico's plea agreement. The Seventh Circuit's affirmation is in clear conflict with decisions from the First, Fifth and Ninth Circuits. This Court may judicially note that over ninety percent of all federal criminal indictments are resolved by guilty pleas, and therefore, this petition presents an additional

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[7] (...continued)
carried, even accompanied by proof that the defendant performed some act to facilitate or encourage the underlying crime in connection with which the firearm was carried is insufficient to support a conviction for aiding and abetting the firearm, *United States v. Giraldo*, 80 F.3d 667, 676 (2nd Cir. 1996); *United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2nd Cir. 1996) (same); *United States v. Ramirez-Ferrer*, 82 F.3d 1149, 1154 (1st Cir. 1996) (same); *United States v. Bancalari*, 110 F.3d 1425, 1429-30 (9th Cir. 1997) (same), citing *United States v. Medina*, 32 F.3d 40, 45 (2nd Cir. 1994). The Eleventh Circuit recently disagreed with the above § 924(c)(1) aiding and abetting decisions in *Bazemore v. United States*, 138 F.3d 947, 949-50 (11th Cir. 1998).

important question of federal Fifth Amendment due process and criminal procedure which this Court must and should resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted: July 30, 1998
Date: August 6, 1998

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

MARCO DAMICO,

Petitioner-Appellant,

No. 98-1914 v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 97 C 3513 (94 CR 723-1)—Blanche M. Manning, Judge.

Petitioner filed a motion to vacate, correct, or set aside a sentence pursuant to 28 U.S.C. §2255. The district court denied the motion and its supplements and dismissed the action with prejudice. The district court subsequently denied petitioner's application for a certificate of appealability. *See* Fed. R. App. P. 22(b); Cir. R. 22.1.

This court has reviewed the final order of the district court from which petitioner appeals, and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). Accordingly, the application for a certificate of appealability is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3594

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCO DAMICO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 CR 723—**Blanche M. Manning,** *Judge.*

ARGUED MARCH 29, 1996—DECIDED NOVEMBER 8, 1996

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

ROVNER, *Circuit Judge.* In a detailed plea agreement, Marco Damico admitted that for approximately fifteen years, he headed a criminal enterprise that regularly engaged in illegal acts such as extortion, armed robbery, and the operation of gambling and bookmaking businesses. He pled guilty to a series of charges addressed to these activities, the most serious being a conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity and the collection of unlawful debt in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). In furtherance of the RICO conspiracy, Damico also conspired to rob at gunpoint the

participants in a card game scheduled to take place near Lake Geneva, Wisconsin in November 1989. He therefore also pled guilty to the charge of knowingly using or carrying a firearm during and in relation to a crime of violence, which carries a mandatory consecutive prison sentence of five years. 18 U.S.C. § 924(c)(1). After accepting Damico's guilty plea, the district court sentenced him to a prison term of 147 months—87 months for the RICO conspiracy to be followed by the mandatory 60-month term for the firearm conviction. In this appeal, Damico raises three challenges to that sentence. After oral argument, moreover, Damico requested and received permission to file a supplemental brief addressed to the impact on his firearm conviction of the Supreme Court's intervening decision in *Bailey v. United States*, 116 S. Ct. 501 (1995). We now affirm that conviction as well as the sentence imposed below.

I.

Count V of the government's superseding indictment charged Damico with conspiring to rob the participants in the Lake Geneva card game in violation of 18 U.S.C. § 1951. The government alleged that this conspiracy extended from October 3, 1988 to November 30 of the following year, and that Damico's primary co-conspirator in this endeavor was Robert M. Abbinanti. The indictment charged the conspirators with agreeing, at Damico's direction, that a .22 caliber handgun with a silencer would be provided to Abbinanti for use in the robbery. The indictment further alleged that Damico had discussed the robbery with government informant Robert Cooley, who apparently would be participating in the card game, and that in one of their conversations, Damico had stated that there would be no heroes once the card players were confronted with shotguns. According to the government, Abbinanti then traveled to Wisconsin with the silencer-equipped handgun on November 29, 1989, for the purpose of committing the

robbery. For a variety of reasons, however, he never carried out the robbery. Count VI of the superseding indictment charged Damico and Abbinanti with violating 18 U.S.C. § 924(c)(1) by knowingly using or carrying the .22 caliber handgun with silencer during and in relation to the crime of violence (*i.e.*, the conspiracy to commit robbery) charged in count V. (*See* R. 7 at 15-18.) Damico pled guilty to count V but not to count VI. He instead entered a plea of guilty to a one-count information also charging a section 924(c)(1) violation but omitting any mention of the silencer. (R. 197.) That meant that the mandatory consecutive sentence required by section 924(c)(1) was reduced from thirty years (for a silencer-equipped firearm) to five years. *See* 18 U.S.C. § 924(c)(1).

In a detailed plea agreement, Damico stipulated to many of the facts alleged in the indictment. He admitted, for example, that he had conspired with Abbinanti and others to commit the Lake Geneva robbery and that the conspirators had agreed that Abbinanti would use a firearm in the course of the robbery. (R. 203 at 10.) Damico further acknowledged that in planning the robbery, he had inquired of Cooley whether any of the card game participants would bring pistols to the game and then told Cooley "that there would not be any heroes when [they] saw the shotguns." (*Id.* at 11.) Damico agreed that his co-conspirators had then traveled to Lake Geneva and were prepared to commit the robbery as planned. He conceded, in fact, that Abbinanti had "carried" a firearm to Wisconsin for the specific purpose of committing the robbery. (*Id.*) In entering his guilty plea in open court, moreover, Damico acknowledged the accuracy of the facts to which he had stipulated in the plea agreement. (R. 224 at 31.) The district court found that these admissions provided an adequate factual basis for Damico's plea. (*Id.* at 33.) *See* Fed. R. Crim. P. 11(f) (court must satisfy itself of factual basis for a guilty plea).

Despite these admissions, Damico now asks that we vacate his firearm conviction and remand to enable the district court to consider whether a section 924(c)(1) viola-

tion actually occurred. That unusual request is prompted by the Supreme Court's decision in *Bailey*, which was released after the entry of Damico's plea below and after the filing of his opening brief here. The Supreme Court held in *Bailey* that a firearm is not "used" for purposes of section 924(c)(1) unless it is "actively employed" during and in relation to the underlying crime of violence. 116 S. Ct. at 509. The Court explained that "active employment" would include such acts as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon, but would not encompass mere possession or storage, or the placement of the weapon nearby for later use, even if those acts served to embolden the defendant in committing the underlying offense. *Id.* at 508-09. By requiring that a firearm be "actively employed" to qualify as a "use," *Bailey* significantly narrowed the scope that this circuit had previously accorded to section 924(c)(1). *See, e.g., United States v. Gonzalez*, 93 F.3d 311, 318 (7th Cir. 1996); *United States v. James*, 79 F.3d 553, 553-54 (7th Cir. 1996). Damico now seeks to take advantage of *Bailey* to invalidate his earlier plea. Conceding that an adequate factual basis existed to support a statutory violation under our pre-*Bailey* law, he asserts that after *Bailey*, it is unclear whether the conduct acknowledged in the plea agreement still would violate the statute. For this reason, he asks that we vacate his firearm conviction and remand to the district court for further proceedings. *See United States v. Abdul*, 75 F.3d 327, 329-30 (7th Cir.) (vacating plea for knowing use of firearm where the admitted conduct would not constitute a "use" under *Bailey*), *cert. denied*, 116 S. Ct. 2569 (1996); *see also United States v. Robinson*, 96 F.3d 246, 254 (7th Cir. 1996) (factual basis for guilty plea may be insufficient where government proffered only that the defendant "possessed numerous weapons" in connection with a narcotics conspiracy). After reviewing Damico's admissions in the plea agreement and at the plea hearing, however, we are convinced that *Bailey* does not undercut the factual basis for his plea.

The government alleged and Damico admitted that during and in relation to the robbery conspiracy, he caused Abbinanti both to use and to carry a firearm. Although he thus admitted to violating both the "use" and "carry" prongs of section 924(c)(1), a violation of either prong would be sufficient, for the statute is phrased in the disjunctive. In narrowing the scope of the statute's "use" prong in *Bailey*, the Supreme Court emphasized that conduct not rising to the level of a "use" may still fall within the separate "carry" prong. 116 S. Ct. at 509; *see also United States v. Booker*, 73 F.3d 706, 709 (7th Cir. 1996) (*Bailey*'s holding "does not limit the 'carry' prong of § 924(c)."). Indeed, the need to preserve some independent meaning for the term "carry" proved central to the Court's construction of a "use," for the Court found nothing to indicate that Congress intended the two terms to be redundant. *Bailey*, 116 S. Ct. at 506-07, 509. The Court explained that:

> Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Id. at 507. Thus, although neither of the two defendants in *Bailey* had "used" a firearm in the active-employment sense, the Court remanded for consideration of whether their convictions could be upheld under the separate "carries" prong. *Id.* at 509. Following that directive, this court has affirmed section 924(c)(1) convictions in the post-*Bailey* era where "the uncontested actions of a defendant clearly fit the definition of 'carry,' " even if they may not also qualify as a "use." *See Gonzalez*, 93 F.3d at 321 (discussing *United States v. Baker*, 78 F.3d 1241 (7th Cir. 1996)); *see also Booker*, 73 F.3d at 709.

The government believes that is the case here, and unfortunately for Damico, we must agree. Not only did Damico

generally admit to violating section 924(c)(1) both in his plea agreement and before the district court at the plea hearing, but he also acknowledged that in furtherance of the charged conspiracy, Abbinanti had "carried a firearm . . . for the specific purpose of robbing the card game in Wisconsin." (R. 203 at 11.) Thus, even if Damico may have relied on our pre-*Bailey* law in acknowledging a "use" of the firearm, he separately and specifically admitted that the firearm also had been "carried" during and in relation to the charged conspiracy. Damico does not suggest that in making that admission, he relied on any expansive pre-*Bailey* interpretation of the statute's "carry" prong. As a result, Damico's admission provides an adequate factual basis for his plea. *See United States v. Barnhardt*, 93 F.3d 706, 710-11 (10th Cir. 1996) (affirming conviction where defendant admitted at plea hearing that he "carried" a firearm during a drug transaction by tucking it into the back of his pants); *United States v. Rivas*, 85 F.3d 193, 195-96 (5th Cir. 1996) (admissions at plea hearing sufficient to show that firearm was "carried"); *United States v. Riascos-Suarez*, 73 F.3d 616, 623-24 (6th Cir.) (government's proffer at plea hearing sufficient to establish that firearm was "carried" when placed by the defendant in the driver's side console of his vehicle), *cert. denied*, 117 S. Ct. 136 (1996).

Damico nonetheless argues that because the record does not reveal precisely where the weapon was "carried," we should vacate his conviction to enable the district court to inquire further. Damico suggests that for all we know, the weapon was merely stashed in the trunk of Abbinanti's automobile, rather than within his reach inside the vehicle or under his clothing. According to Damico, the weapon would not have been "carried" under the firearm statute unless it was within Abbinanti's reach. *See Baker*, 78 F.3d at 1247 (holding that a defendant "carries" a weapon by transporting it in a car within his reach but reserving the question of whether a firearm locked in the trunk would also be "carried"); *see also United States v. Smith*, 80 F.3d 215, 221 (7th Cir. 1996). Even if Damico is correct

in anticipating how we might rule in a case involving a firearm locked in the trunk of an automobile, he should have considered that issue before admitting below that this weapon was "carried." There is nothing in the record to indicate that when Damico executed the plea agreement, he remained in the dark about where the firearm had been kept. If it was in the trunk, as Damico now suggests, then he should have refrained from acknowledging that the firearm ever was "carried." After all, the argument Damico now makes—that a firearm is not "carried" if only transported in the trunk of an automobile—was available under our pre-*Bailey* cases. *United States v. Edun*, 890 F.2d 983, 988 (7th Cir. 1989), in fact, expressly reserved that question while noting the difficulties other circuits have had in delineating the scope of the statutory term "carries." *Cf. United States v. Ocampo*, 890 F.2d 1363, 1371 (7th Cir. 1989) (defendant could be convicted of "carrying" a weapon that was hidden under automobile seat). Damico effectively waived the argument, then, by admitting as a background fact that his co-conspirator "carried" the firearm during and in relation to the underlying crime of violence. *See Edun*, 890 F.2d at 987-88 (defendant waived argument that firearm in vehicle's trunk was not "carried"). At the same time, that admission provides an adequate factual basis for Damico's plea.

II.

A.

Having dispensed with Damico's supplemental argument, we turn to the sentencing issues raised in his primary brief. Damico first contends that the district court erred in adding four points to his base offense level under U.S.S.G. § 3B1.1(a) to account for his leadership role in the racketeering conspiracy. That section authorizes a four-level enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more par-

ticipants, or was otherwise extensive." U.S.S.G. § 3B1.1(a).[1] Damico concedes that this enhancement would apply to his role in the overall RICO conspiracy but argues that because the base offense level applicable to that conspiracy was established via a cross-reference to the "underlying racketeering activity" (*see* U.S.S.G. § 2E1.1(a)(2)),[2] his role in the offense must be separately judged with respect to each underlying offense. That argument is based on Application Note 1 to section 2E1.1, which provides as follows:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1, comment. (n.1). Damico argues that when the procedure required by the application note is followed here, the four-level enhancement would not apply because the particular racketeering offense used in establishing his base offense level did not involve "five or more participants" and was not "otherwise extensive."

We generally review a district court's conclusion about a defendant's aggravating role in the offense only for clear error. *E.g.*, *United States v. Johnson-Dix*, 54 F.3d 1295,

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[1] Guideline references in this opinion are to the 1994 version, which was in effect on the date of Damico's sentencing.

[2] Section 2E1.1 provides:

> **Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations**
>
> (a) Base Offense Level (apply the greater):
>
> (1) 19; or
>
> (2) the offense level applicable to the underlying racketeering activity.

1309 (7th Cir. 1995). In this case, however, Damico argues that the district court misconstrued the relationship between sections 2E1.1 and 3B1.1 of the guidelines. His argument therefore raises an issue of guidelines interpretation that we consider de novo. *See United States v. Tai*, 41 F.3d 1170, 1174 (7th Cir. 1994); *United States v. Ford*, 21 F.3d 759, 765 (7th Cir. 1994).

Note 1 of the commentary to section 2E1.1 provides that where the underlying racketeering activity includes more than a single substantive offense, each such offense must be treated as if "contained in a separate count of conviction" for the purpose of applying subsection (a)(2). U.S.S.G. § 2E1.1, comment. (n.1). The parties agree that under this application note, the underlying racketeering activity in this case is properly divided into four offense groups: (1) the illegal gambling and bookmaking businesses; (2) the conspiracy to rob the Lake Geneva card game; (3) the extortionate extraction of a street tax from and unlawful extension of credit to Robert Cooley; and (4) the extortionate extraction of a street tax from Richard Lantini. *See generally* U.S.S.G. § 3D1.2 (establishing grouping rules for related counts). Of these groups, the Cooley extortions produce the highest unadjusted offense level—a 20 pursuant to section 2E2.1(a).[3] The adjustments required by Chapter Three, Parts A through D, must then be applied to the subsection (a)(1) offense level of 19 and the subsection (a)(2) offense level of 20, with the subsection producing the greater overall offense level to be used in establishing the defendant's base offense level. U.S.S.G. § 2E1.1 comment. (n.1). Although the parties dispute how section 3B1.1 should be applied in this case, they ultimately agree that once the relevant Chapter Three adjustments are applied, subsection (a)(2) will produce the higher

[3] The gambling and bookmaking offenses are assigned an offense level of 12 pursuant to section 2E3.1, the conspiracy to commit robbery an offense level of 17 pursuant to sections 2X1.1 and 2B3.1(a), and the Lantini extortions an offense level of 18 pursuant to section 2B3.2.

overall offense level. That is because only the subsection (a)(2) offense level will receive a four-level adjustment under section 3D1.4 to produce the combined offense level for the four groups of racketeering offenses. *See* U.S.S.G. § 3D1.4. Subsection (a)(2) must therefore be used to establish Damico's base offense level for the racketeering conspiracy. *See* U.S.S.G. § 2E1.1, comment. (n.1).

With that as a given, the parties dispute whether the particular adjustment for Damico's aggravated role in the offense should address his role in the overall conspiracy, or only his role in the specific predicate offense from which his base offense level is derived. Damico concedes that if his role in the overall conspiracy is considered, then he qualifies for the four-level enhancement given to "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." *See* U.S.S.G. § 3B1.1(a). Yet he argues that because subsection (a)(2) applies to his case, only his role in the predicate acts of extortion may be considered. Although a defendant's aggravating role is judged in relation to the offense of conviction and all relevant conduct under section 1B1.3 (*United States v. Lewis*, 79 F.3d 688, 691 (7th Cir. 1996)), Damico asserts that the remainder of his racketeering conduct would not be considered relevant to the extortion-related conduct here. Under Damico's view, then, the four-level enhancement was improper because the extortion-related conduct involved but one person other than himself.

We rejected an approach similar to Damico's in *United States v. Morgano*, 39 F.3d 1358, 1379 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2559 (1995), observing that section 3B1.1's use of the phrase "criminal activity" is "broad enough to include the entire racketeering conspiracy rather than the particular predicate act alone." *Morgano* found support for this conclusion in the commentary to section 3B1.1, which instructs that " 'all persons involved during the course of the entire offense are to be considered' " in assessing whether criminal activity is "otherwise exten-

sive." *Id.* (quoting U.S.S.G. § 3B1.1, comment. (n.2)).[4] The government insists that *Morgano* is controlling, but not so fast says Damico. He contends that *Morgano*'s focus on the broad phrase "criminal activity" in section 3B1.1 fails to answer the argument he makes here based on the commentary to section 2E1.1. He asserts, in other words, that *Morgano*'s approach is inconsistent with Application Note 1.

But Damico's argument does not account for the fact that section 2E1.1's sole purpose is to establish the *base offense level* for a RICO offense, not the adjusted offense level. By using the offense level that would apply to the underlying racketeering activity unless that offense level is less than the minimum base offense level of 19, the guideline "ensures that a RICO defendant will not receive a *lesser* sentence than would attach to the underlying acts, simply by virtue of his having committed them in furtherance of a racketeering scheme." *United States v. Butt*, 955 F.2d 77, 89 (1st Cir. 1992) (emphasis in original). At the same time, however, the guideline also is designed to account for the fact that a particular offense used to establish the base offense level under subsection (a)(2) was committed in furtherance of a larger racketeering scheme. It does this through application of the Chapter Three adjustments to the base offense level that results. If Damico were correct that an adjustment like that in section 3B1.1 could be applied only to the predicate act used under subsection (a)(2), then a defendant convicted of organizing a far-reaching RICO enterprise could avoid the adjustment so long as that predicate act involved fewer than five participants and was not otherwise extensive. No account would be taken, then, of the fact that those participating in the isolated predicate act actually were acting in con-

[4] We applied an earlier version of the guidelines in *Morgano*. Under the 1994 guidelines, the quoted language appears in Application Note 3.

nection with a larger criminal enterprise. As we see it, however, section 2E1.1 was designed to take account of that fact.

Again, Damico points to Application Note 1, insisting that it requires the adjustments to be applied separately to each predicate act. But that note only requires the underlying offenses to be treated separately "for the purposes of subsection (a)(2)"—that is, only for the purpose of establishing the base offense level applicable to the RICO conspiracy. The note does not say that the separate treatment extends as well to application of the Chapter Three adjustments. Although the note indicates that the adjustments are to be applied to the offense levels generated under subsections (a)(1) and (a)(2), that is for the purpose of determining which subsection will ultimately apply. In short, we see nothing in section 2E1.1 or its commentary to indicate that an adjustment like that in section 3B1.1 should not be applied to a RICO base offense level generated under subsection (a)(2) in the same way that it would to any other base offense level—by looking to the count of conviction (the overall RICO conspiracy) and all relevant conduct within the scope of section 1B1.3. *See* U.S.S.G. § 3B1.1, Introductory Commentary.

We hold, therefore, that the predicate-by-predicate approach of Application Note 1 applies, as the note states, only for the purpose of establishing a RICO defendant's base offense level, and not for the purpose of applying the Chapter Three adjustments. The district court, then, properly looked to the overall racketeering conspiracy in assessing Damico's role in the offense under section 3B1.1.

B.

Damico next contends that the district court used the wrong criminal history category in determining his sentencing range. The court placed Damico in category III after assessing him four criminal history points—one point for a one-year sentence of supervision imposed on a 1984

battery conviction (*see* U.S.S.G. § 4A1.1(c)), one point for a one-year sentence of conditional discharge imposed on a 1989 reckless driving conviction (*see id.*), and two points because Damico committed the instant racketeering offense while under these sentences (*see* U.S.S.G. § 4A1.1(d)). Damico contends that the reckless driving sentence should not produce a criminal history point because under U.S.S.G. § 4A1.2(c)(1)(A), a sentence for careless or reckless driving is counted only if "the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days." The district court concluded that an Illinois sentence of conditional discharge is the equivalent of a sentence of probation for purposes of that guideline, but Damico insists that the two are distinct and that his reckless driving sentence does not qualify as a "term of probation."

Damico's argument, however, runs headlong into *United States v. Caputo*, 978 F.2d 972, 976-77 (7th Cir. 1992), which held that an Illinois sentence of conditional discharge is to be equated with a "term of probation" for purposes of section 4A1.2(c)(1)(A):

> Probation means that the convicted defendant is not incarcerated but must comply with various conditions set by the sentencing court and monitored by a probation officer, such as periodic reporting, keeping out of trouble, and keeping clean of drugs. Conditional discharge is the same except that there is no probation officer, and in fact was introduced into Illinois law (we conjecture, with some support in Council Commentary, Smith-Hurd Ill. Stat. Ann. ch. 38 ¶1005-1-4, and Jay M. Hanson, "The Conditional Discharge—A New View in Misdemeanor Sentencing," 62 *Ill. Bar J.* 280 (1974)) as a way of coping with the shortage of probation officers. It is probation without the probation officer and that is a distinction without a difference so far as the purposes of the guideline exception is concerned.

Caputo also noted that the Sentencing Commission equates "unsupervised probation" with supervised probation under

a separate section of the guidelines, and because we viewed "unsupervised probation" as the equivalent of conditional discharge, we equated a sentence of that type with supervised probation as well. *Caputo*, 978 F.2d at 977 (citing U.S.S.G. § 4A1.1, comment. (n.4)); *see also United States v. Scott*, 19 F.3d 1238, 1246 (7th Cir.) (also equating conditional discharge with probation), *cert. denied*, 115 S. Ct. 163 (1994). The Eighth Circuit found *Caputo*'s analysis persuasive in *United States v. Lloyd*, 43 F.3d 1183, 1187-88 (8th Cir. 1994), and agreed that an Illinois sentence of conditional discharge qualifies as a "term of probation" under section 4A1.2(c)(1)(A). *See also United States v. Caswell*, 36 F.3d 29, 31 (7th Cir. 1994) (equating Kentucky sentence of "90 days' incarceration, suspended on condition that defendant not commit any theft-related services in Kentucky for two years" with a "term of probation" for purposes of section 4A1.2(c)(1)(A)); *cf. United States v. Labella-Szuba*, 92 F.3d 136, 138 (2d Cir. 1996) ("[E]very circuit that has compared a conditional discharge sentence to a sentence of unsupervised release has found them to be functionally equivalent."). *Caputo* dooms Damico's argument, and we are not persuaded by his diligent efforts to avoid its holding.

C.

We shall make short work of Damico's final argument—a challenge to the district court's two-level upward departure to account for his involvement in organized crime. Damico does not dispute the fact of his involvement; indeed, he stipulated below that the government's proof on that point was sufficient and expressly waived his right to challenge the sufficiency of that evidence on appeal. (R. 267.) His argument, rather, is that section 2E1.1 factors a defendant's involvement in organized crime into the base level applicable to a RICO offense. According to Damico, then, a defendant's involvement in organized crime does not qualify as an aggravating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating

the guidelines," making it an improper basis for upward departure. *See* U.S.S.G. § 5K2.0. We rejected the identical argument, however, in *United States v. Rainone*, 32 F.3d 1203, 1209 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2245 (1995), concluding that a defendant's involvement in organized crime is not reflected in the base offense level assigned to him under section 2E1.1. That is so regardless of whether the base offense level is established under subsection (a)(1) or (a)(2) of the RICO guideline, for neither the RICO statute nor the underlying offenses to which it applies are limited in application to defendants engaged in organized crime. Thus, when a nexus to organized crime exists, as it admittedly does here, it provides a proper basis for departure. *Rainone*, 32 F.3d at 1209.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 94 CR 723
v.	)	Honorable
	)	Blanche M. Manning
MARCO DAMICO and	)	
ROBERT M. ABBINANTI	)	

The UNITED STATES ATTORNEY charges:

On or about November 29, 1989 to on or about November 30, 1989, in the Northern District of Illinois, Eastern Division, and elsewhere,

MARCO DAMICO, and
ROBERT M. ABBINANTI,

defendants herein, did knowingly use and carry a firearm during and in relation to a crime of violence, for which the defendants may be prosecuted in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951, as more fully set forth in Count Five of the indictment in Case no. 94 CR 723;

In violation of Title 18 United States Code, Section 924(c)(1), and Title 18 United States Code, Section 2.

/s/ Scott R. Lassar
ACTING UNITED STATES ATTORNEY

[Dated May 16, 1996]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 94 CR 723-1
	)	
MARCO D'AMICO.	)	
	)	

ORDER

This matter comes before the court on the motion of defendant Marco D'Amico pursuant to 28 U.S.C. Section 2255, attempting to vacate the conviction and sentence which is predicated on a violation of 18 U.S.C. Section 924(c). For the following reasons, we dismiss defendant's motion.

As a preliminary matter, precedent in this district supports the proposition that a district court should not consider a 28 U.S.C. Section 2255 motion while a direct appeal is pending, absent extraordinary circumstances. *See United States v. Robinson,* 8 F.3d 398, 406 (7th Cir. 1993). In other words, D'Amico should be precluded from raising the recent Supreme Court case of *United States v. Bailey* as a basis to vacate his conviction for the first time in this 2255 motion, without raising it in his appeal to the seventh circuit. His failure to raise this issue on direct appeal to the seventh circuit precludes him from doing so in this section 2255 motion. *Barker v. United States,* 7 F.3d 629, 631 (7th Cir. 1993), *cert. denied,* 114 S.Ct. 939, 127 L.Ed.2d 229 (1994).

We are well aware that the Supreme Court just recently decided *United States v. Bailey*. Yet, Bailey was decided six days before D'Amico filed his initial brief on appeal from his sentence. Further, our review of the file indicates that D'Amico still has not brought this argument to the attention of the Seventh Circuit. Most important, our review of D'Amico's respective pleadings does not provide this court with any extraordinary circumstances. Precedent in this district simply does not sanction a decision to entertain defendant's Section 2255 motion. *See U.S. v. Robinson*, 8 F.3d 398, 406 (7th Cir. 1993). Therefore, defendant D'Amico's motion to vacate pursuant to section 2255 is dismissed.

DATE: MAY 16 1996

/s/ Blanche M. Manning
United States District Court
Blanche M. Manning

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA,	)	No. 94 CR 723
Plaintiff,	)	
vs.	)	Chicago, Illinois
MARCO DAMICO,	)	May 22, 1996
Defendant.	)	10:00 a.m.

REPORT OF PROCEEDINGS
BEFORE THE
HONORABLE BLANCHE M. MANNING

APPEARANCES:

FOR THE PLAINTIFF: MR. JOHN BURLEY
MR. PATRICK J. KING, JR.
(United States Attorney's Office,
219 S. Dearborn, Room 500,
Chicago, IL 60604)

FOR THE DEFENDANT: MR. ALLAN A. ACKERMAN
(2000 North Clifton,
Chicago, IL 60614)

PATRICK J. MULLEN
Official Court Reporter
2128 United States Courthouse
Chicago, Illinois 60604
(312) 435-5565

THE CLERK: 94 CR 723, U.S.A. versus Damico.

MR. ACKERMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. ACKERMAN: Allan Ackerman for the petitioner.

MR. BURLEY: If it please the Court, I'm John Burley. I appear for the government with Patrick King.

THE COURT: Your motion, Mr. Ackerman?

MR. ACKERMAN: The motion is a motion for clarification, Your Honor.

THE COURT: Right, to clarify the order. I thought it was implicit in what I said, but maybe it wasn't as clear as I thought it was. It is definitely without prejudice.

MR. ACKERMAN: Thank you.

THE COURT: All right. I will file an amended minute order reflecting that.

MR. ACKERMAN: Okay.

MR. BURLEY: The problem Mr. Ackerman is going to have in the future, Your Honor, is he's always going to have to meet the Fardy cause and prejudice standard, but we can face that in the future.

THE COURT: That's something down the road, right.

MR. ACKERMAN: Thank you.

MR. BURLEY: Thank you, Your Honor.

THE COURT: You're welcome.

(Proceedings concluded.)

[Dated January 28, 1998]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCO DAMICO, Petitioner,	)	
v.	)	97 CV 3513
	)	94 CR 723-1
UNITED STATES OF AMERICA,	)	
Respondent.	)	

ORDER

The following are before the court: (1) Marco Damico's motion for relief pursuant to 28 U.S.C. § 2255; (2) Damico's motion to consolidate this case with No. 96 C 8462 (a § 2255 motion filed by Robert Abbinanti, one of Damico's co-defendants, that has already been decided): (3) Damico's motion to renew his original § 2255 motion; (4) the government's motion to dismiss Damico's latest § 2255 motion; and (5) Damico's "responsive submission and authorities in opposition of dismissal." For the reasons stated below, Damico's § 2255 motion and his motion to renew his prior § 2255 motion are denied and Damico's motion to consolidate this case with No. 96 C 8462 and the government's motion to dismiss Damico's § 2255 motion are denied as moot.

Background

Damico filed his first § 2255 motion on March 12, 1996, while his direct appeal was pending. In that motion, Damico asked this court to vacate his § 924(c)

conviction and sentence based on *Bailey v. U.S.*, 116 S.Ct. 501 (1995). The government sought dismissal of Damico's § 2255 motion based on the pendency of his direct appeal. *See U.S. v. Robinson*, 8 F.3d 398, 406 (7th Cir. 1993). In the meantime, on April 24, 1996, the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), which restricts second or successive requests for collateral relief, went into effect. Pub. L. 104-132, 100 Stat. 1214 (1996). This court subsequently dismissed Damico's § 2255 motion on May 16, 1996 due to the pendency of his direct appeal, and clarified that the dismissal was without prejudice on May 22, 1996. The Seventh Circuit ultimately considered and rejected Damico's *Bailey* argument on direct appeal. *U.S. v. Damico*, 99 F.3d 1431, 1434 (7th Cir. 1996).

Damico characterizes his present § 2255 motion as raising a *Bailey* issue. He is not, however, actually attempting to relitigate the *Bailey* issues already rejected by the Court of Appeals. Instead, he appears to be claiming that the court lacked jurisdiction to convict and sentence him for violations of 18 U.S.C. § 1951 and that, because the court lacked jurisdiction under § 1951, it could not convict and sentence him for violations of § 924(c).

Jurisdiction

Jurisdiction over Damico's latest § 2255 motion is proper only if it is not a "second or successive" motion, as defined by the AEDPA. A petition dismissed without prejudice for failure to exhaust, failure to pay the docketing fee, or because it is unintelligible or poorly developed, does not count as a "first" petition. *O'Connor*

v. United States, No. 97-2278 (7th Cir. January 9, 1998); *Benton v. Washington*, 106 F.3d 162 (7th Cir. 1996). A voluntary dismissal that is a concession of defeat, however, makes the first petition count. *Felder v. McVicar*, 113 F.3d 696 (7th Cir. 1997).

Here, the court dismissed the first § 2255 motion without prejudice at the government's request, and did not reach the merits of Damico's claims due to the pendency of Damico's direct appeal. *See* May 16, 1996 and May 22, 1996 orders, filed in *U.S. v. Damico*, No. 94 CR 723-1; *U.S. v. Robinson*, 8 F.3d at 406. The government argues that Damico's first § 2255 motion counts for the purposes of the AEDPA because his second motion repeats arguments raised in his first motion and that the court, therefore, lacks jurisdiction over the second § 2255 motion.

In response, Damico contends that the dismissal of his first § 2255 motion does not count because it was dismissed so he could exhaust his federal appeals. He says he therefore fits into the "exhaustion" pigeonhole in *Benton*. Alternatively, he asks the court to find that his second § 2255 motion is a continuation of his first. He appears to be arguing that his second § 2255 motion should be treated as a request for Rule 60(b) relief and that his first § 2255 proceeding should be reopened. Under this logic, there would only be one § 2255 motion, so the AEDPA's limitations on the filing of second or successive motions would be irrelevant.

Both sides' arguments demonstrate a misunderstanding of the AEDPA. First, the substance of a second request for collateral relief does not determine whether the first petition counts for the purposes of the

AEDPA—the reason for dismissal does. *O'Connor v. United States*, slip op. at 2-3; *Benton v. Washington*, 106 F.3d at 164-65; *Felder v. McVicar*, 113 F.3d at 697-98. Second, dismissal for failure to exhaust can only arise in the context of § 2254 petitions because "exhaustion" refers to the exhaustion of state court remedies, not the completion of federal direct appeals. Third, the court cannot condone the use of a motion to renew a prior request for collateral relief or a motion to reopen a completed § 2255 proceeding under Fed.R.Civ.Pro. 60(b) as a device to avoid the limits on successive petitions because a petitioner cannot circumvent the AEDPA simply by reopening his first habeas case. *Burris v. Parke*, 130 F.3d 782, 783-84 (7th Cir. 1997) (Rule 60(b) motion filed after determination of a § 2255 on the merits is a successive collateral attack under the AEDPA).

With that said, the court turns to whether the first § 2255 motion counts under the AEDPA. It does not, because the court did not reach the merits of the first motion and Damico did not agree to the dismissal of that motion because he though he was going to lose. *Benton v. Washington*, 106 F.3d at 164-65; *Felder v. McVicar*, 113 F.3d at 698. The fact that the first § 2255 motion was dismissed after the AEDPA became effective does not alter this conclusion, as the government sought dismissal of the first § 2255 motion prior to the AEDPA's effective date and the dismissal was non-merits based. *Cf. Felder v. McVicar*, 113 F.3d at 698 (first § 2254 petition counts for purposes of the AEDPA where defendant moved for dismissal two months after the enactment of the AEDPA and essentially conceded defeat). There are no statute of limitations problems as Damico filed his second § 2255 motion on May 13, 1997,

and his conviction became final within one year prior to that date. *See* 38 U.S.C. § 2255, 6th unnumbered paragraph. Accordingly, the court may reach the merits of Damico's latest request for relief under § 2255.*

Damico's Request for § 2255 Relief

In his § 2255 motion, Damico argues that the court lacked jurisdiction to convict and sentence him for violations of 18 U.S.C. §§ 1951 and 924(c) because the conspiracy with which he was involved had no effect on interstate commerce. A major stumbling block to this argument, however, is the fact that Damico pleaded guilty and stipulated, among other things, that: (1) the robbery that was the subject of the conspiracy was to take place across state lines; (2) he knowingly and intentionally participated in the criminal enterprise; (3) the robbery was in furtherance of the criminal enterprise; and (4) the robbery would affect interstate commerce. Plea Agreement ¶ 5(e). The court also notes that Damico stipulated to all of the facts in the Plea Agreement. *See United States v. Damico*, 99 F.3d 1431, 1434-35 (7th Cir. 1996).

Damico attempts to avoid the effect of his stipulation by arguing that he did not know that he could raise an unspecified "legal challenge" to the § 1951 charge before he pleaded guilty. Exhibit 4 to § 2255 Motion Damico Affidavit) at ¶¶ 2-5. This belated attempt to challenge

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* Damico asks the court to construe his § 2255 motion as a § 2241 motion if we find that his pending § 2255 motion is barred by the AEDPA. Because the court finds that Damico's pending § 2255 motion is not a second or successive motion, this argument need not be reached.

his plea agreement is unavailing because, as shown by the detailed plea agreement itself and the extensive plea colloquy, Damico's plea was knowing and voluntary. First, Damico acknowledged that he read and discussed all of the charges with his attorney and that he fully understood them. Second, Damico's responses during the colloquy convince the court that the plea was knowing and voluntary and that Damico was fully aware of the facts underlying the elements of the offenses to which he pled guilty. The court also finds that the government established an independent factual basis that the conduct alleged, to which Damico stipulated, affected interstate commerce.

Damico also attempts to avoid his stipulation by citing to *United States v. Isirov*, 986 P.2d 183 (7th Cir. 1993), in support of his contention that he is not bound by the facts in his stipulation. In *Isirov*, a direct appeal challenging the defendant's sentence, the government argued that the defendant had waived any challenges to the PSR by stipulating to the facts in the PSR in his plea agreement. *United States v. Isirov*, 986 F.2d at 186. The appellate court rejected this argument, stating that the stipulation did not bind the district court and that the district court was obligated to determine the facts relevant to sentencing. *Id.* Damico's out-of-context citation to *Isirov* does not help him because, as noted above, the stipulated facts were not blindly accepted by this court.

With the fact that the plea agreement is binding in mind, the court now turns to Damico's argument that the court lacked jurisdiction to convict and sentence him for violations of 18 U.S.C. §§ 1951 and 924(c) because the conspiracy with which he was involved had no effect

on interstate commerce. Damico could have raised this argument on direct appeal, and "[i]t is well established that § 2255 is not available to advance arguments that could have been presented in a direct appeal from a conviction." *Woodruff v. U.S.*, No. 96-3692, 1997 WL 768941 *3 (7th Cir. Dec. 15, 1997) (citations omitted).

Damico's contention that his interstate commerce argument is jurisdictional and thus may be raised at any time is unavailing. It is true that a guilty plea does not waive jurisdictional defenses to a crime. *See, e.g., U.S. v. Nash*, 29 F.3d 1195, 1201 (7th Cir. 1994). It is also true that the court may examine, on a § 2255 motion, the propriety of its original exercise of jurisdiction. *Kelly v. United States*, 29 F.3d 1107, 1113 (7th Cir. 1994). The problem with Damico's "jurisdictional" argument, however, is that it is not actually a challenge to the court's jurisdiction.

As the Court of Appeals recently explained, there are only two types of jurisdictional defenses that may not be stipulated or waived by the parties—jurisdiction in the sense of a case or controversy within the meaning of Article III and jurisdiction in the sense of the statutory grant of adjudicatory power. *Kenar v. U.S.*, 118 F.3d 527, 529-30 (7th Cir. 1997). A nexus with interstate commerce is an element of § 1951 and is "jurisdictional" only in the sense that without it, there is no federal crime. *See id.* at 530 ("'Jurisdiction' is appropriated as a shorthand for the commerce element in many a federal statute which may require proof that acts were in or affected interstate commerce"). This type of "jurisdictional" argument is not a true challenge to the court's jurisdiction over Damico's criminal case, and thus may not be raised at this stage in the proceedings.

Conclusion

Damico's present § 2255 motion is not a "second or successive" motion under the AEDPA. Turning to the merits of the § 2255 motion, because Damico could have raised his commerce clause argument on direct appeal and that argument is non-jurisdictional, we may not consider it. Accordingly, Damico's motion for relief pursuant to 28 U.S.C. § 2255 and his motion to renew his original § 2255 motion are denied and Damico's motion to consolidate this case with No. 96 C 8462 and the government's motion to dismiss Damico's § 2255 motion are denied as moot.

DATE: 1-28-98

/s/ Blanche M. Manning
Blanche M. Manning
United States District Court Judge

[Dated March 24, 1998]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCO DAMICO, Petitioner,	)	
v.	)	97 CV 3513
UNITED STATES OF AMERICA,	)	94 CR 723-1
Respondent.	)	

ORDER

Marco Damico, through counsel, seeks reconsideration of the court's January 28, 1998 order denying his motion pursuant to 28 U.S.C. § 2255 and, alternatively, asks the court to issue a certificate of appealability. He also requests leave to file a reply to the government's response to his supplement to his § 2255 motion. For the following reasons, Damico's motion for leave to file a reply is granted, the remaining relief sought in the motion for leave to file a reply is denied, the relief requested in Damico's supplement to his § 2255 motion is denied, and his motions to reconsider and for a certificate of appealability are denied.

Motion to Reconsider

With respect to Damico's first argument—that the court overlooked his ineffective assistance of counsel argument—the court has carefully reviewed the entire file and finds that no such argument was raised in Damico's § 2255 motion. Damico's statement that he did

not know that he could raise an unspecified "legal challenge" to the Hobbs Act charge before he pleaded guilty is a challenge to his plea agreement, rather than an ineffective assistance argument. Moreover, this kind of vague statement is not enough to place the issue before the court, and counsel may not attempt to litigate this issue now, after this court has rejected Damico's other arguments.

In any event, any ineffective assistance of counsel argument based on this alleged inadequacy would fail in light of the plea colloquy. *See Alvarez v. United States*, 134 F.3d 888 (7th Cir. 1998) (rejecting defendant's argument that, had counsel allowed him to make an informed decision about whether to go to trial or plead guilty, he would have gone to trial because "after the district court's thorough questioning at the plea hearing, [he] fully admitted to the facts as charged and knowingly and Voluntarily pleaded guilty. . . . Merely alleging that he would have insisted on going to trial is insufficient to establish prejudice. . .")

The court has already considered arguments two and three—that his interstate commerce argument is jurisdictional and that *Bousley v. Brooks*, 97 F.3d 284 (8th Cir. 1996), *cert. granted* 118 S.Ct. 31 (1997); *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997), *cert. granted* 118 S.Ct. 621 (1997); and *United States v. Muscarello*, 106 F.3d 636 (5th Cir.), *cert. granted*, 118 S.Ct. 621 (1997), warrant deferring ruling until the Supreme Court decides those cases—and declines to revisit its prior decision. *See Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (motions to reconsider may not be used to rehash old arguments).

Finally, Damico directs the court's attention to two recently decided Seventh Circuit cases: *Alvarez*, cited above, and *Howard v. United States*, 135 F.3d 506 (7th Cir. 1998). The court has examined these cases, and concludes that they do not affect the court's prior ruling in any way. Thus, Damico's motion to reconsider is denied.

Motion to Supplement

The court previously granted Damico leave to supplement his § 2255 motion to add an additional argument.[1] In his motion to supplement, Damico contends that venue in the Northern District of Illinois over the § 924(c) charge was improper, despite the fact that venue was proper on the underlying conspiracy charge. Damico also cites to *United States v. Palma-Ruedas*, 121 F.3d 841 (3d Cir. 1997), and contends that the Supreme Court is likely to accept the petition for a writ of certiorari filed in that case, 66 U.S.L.W. 3474 (Jan. 7, 1998) (No. 97-1139).[2]

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[1] The restrictions on second or successive requests for collateral relief in the Antiterrorism and Effective Death Penalty Act do not affect the court's decision, as Damico's request was filed in his first § 2255 proceeding, before this court concluded its consideration of that case.

[2] The court notes that the venue argument in *Palma-Ruedas* was raised by defendant Rodriguez-Moreno and that the Supreme Court recently denied three petitions for a writ of certiorari filed by Rodriguez-Moreno's co-defendants. *See Pacheco v. United States*, 118 S.Ct. 725 (Jan. 12, 1998); *Pedorza-Oritz v. United States*, 118 S.Ct. 894 (Jan. 26, 1998); *Ruedas v. United States*, 118 S.Ct. 1110 (Feb. 23, 1998).

The venue issue raised in *Palma-Ruedas*, which was decided on July 30, 1997, was also previously considered by the Fifth and Ninth Circuits in 1994 and 1995. *See United States v. Corona*, 34 F.3d 876 (9th Cir. 1994); *United States v. Pomranz*, 43 F.3d 156 (5th Cir.), *cert. denied*, 116 S.Ct. 513 (1995). Damico's § 2255 motion was filed in May, 1997, and the court permitted Damico to file an additional memorandum regarding his § 2255 motion in January, 1998. Clearly, Damico could have raised his venue argument when he filed his § 2255 motion and when he filed his supplemental memorandum. The court declines to consider arguments that could have been previously presented.

The court also notes that Damico's venue argument, presented for the first time in connection with his § 2255 motion, comes too late. *Cf. United States v. Palma-Ruedas*, 121 F.3d at 847. In any event, Damico stipulated that the gun was carried in the Northern District of Illinois and, as previously discussed, cannot avoid that concession.

Motion for a Certificate of Appealability

Damico also requests a certificate of appealability pursuant to 28 U.S.C § 2253(c)(2), which requires him to make a substantial showing of the denial of a constitutional right. The court finds that Damico has failed to satisfy this standard. His request for a certificate of appealability is, therefore, denied.

Conclusion

Damico's motion for leave to file a reply [20-1] is granted. The remaining relief sought in the motion for leave to file a reply [20-2] is denied. It is further ordered that the relief requested in Damico's supplement to his § 2255 motion [17-2] is denied. Finally, Damico's motion to reconsider [16-1] and his alternative motion for a certificate of appealability [16-2] are denied.

ENTER: 3/24/98

/s/ Blanche M. Manning
Blanche M. Manning
United States District Court